



U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

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OFFICE OF ADMINISTRATIVE APPEALS

425 Eye Street N.W.

ULLB, 3rd Floor

Washington, D.C. 20536

File:

Office: TEXAS SERVICE CENTER

Date: FEB 25 2003

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(a)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**


INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) dismissed the petitioner's subsequently filed appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted and the matter will be reopened for entry of a new decision. The decisions of the director and the AAO will be affirmed.

The petitioner is a limited liability company organized in the State of Texas. It is engaged in real estate data research. It seeks to employ the beneficiary as its general manager. Accordingly, the petitioner seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established that the beneficiary had been or would be employed in a managerial or executive capacity for the United States entity. The director further determined that the petitioner had not established its ability to pay the beneficiary the proffered wage of \$40,000 per year. The AAO affirmed these determinations on appeal and also noted for the record that the petitioner had not established a qualifying relationship with the beneficiary's overseas employer.

On motion, counsel for the petitioner asserts that the AAO focussed on the petitioner's number of employees without considering the petitioner's reasonable needs. Counsel also asserts that the beneficiary manages an essential function of the petitioner. Counsel further asserts that the petitioner's foreign parent company has pledged its support of the petitioner and that with this support the petitioner has established the ability to pay the beneficiary the proffered wage. Counsel finally asserts that the AAO's analysis of the petitioner's qualifying relationship with the beneficiary's overseas employer violates due process as the analysis went beyond the appealed issues.

The first issue to be examined is whether the petitioner established the beneficiary would be employed in a managerial or executive capacity with the United States petitioner.

The petitioner initially described the beneficiary's duties as the "President of the Houston office" as follows:

Plans, develops, and establishes policies and objectives of business organization in accordance with board directives and organization charter. (30%)

Plans business objectives and develops organizational policies to coordinate functions and operations between divisions, departments and the China parent company and establish responsibilities and procedures for attaining foreign real estate investor [sic] in the Far East.

(10%)

Plans and develops Marketdata strategy of introducing data survey methodology into Taiwan [sic] real estate markets to improve company's sales and profit. (35%)

Directs and coordinates activities of department or division. (5%)

Review analysis of activities, costs, operations, and forecast data to determine department or division progress toward stated goals and objectives. (5%)

Confers with company officers and other administrative personnel to review achievements and discuss required changes in goals or objectives resulting from current arrangement and conditions. (5%)

Reviews activity reports and financial statements to determine progress and status in attaining objectives and revises objectives and plans in accordance with current conditions. (5%)

Directs and confers with company directive personnel to review feed-back information from customers to adjust data analysis procedure and change objectives. (5%)

The petitioner also paraphrased the first three elements of the definition of "executive capacity" and added as a fourth element that the beneficiary would promote sales in China. The petitioner concluded that the beneficiary would be performing in an "executive capacity."

The petitioner also stated that one of the members of the limited liability company was its president whose primary responsibilities were "market research, projection analysis, business packaging, partnership formation financing structure, and business operations." The petitioner mentioned another member of the limited liability company, an attorney, but did not detail any duties associated with the petitioner performed by that individual. The petitioner referenced key personnel but did not provide a description of duties for the key personnel. The petitioner provided its organizational chart dated 1998 depicting 14 employees. Other than the beneficiary and the two individuals described as members of the limited liability company, the chart does not reflect the names of individuals who were issued Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements by the petitioner in the year 1998.

In response to the director's request for evidence regarding the petitioner's staffing levels, the petitioner stated that due to the seasonal nature of its business it employed a number of independent contractors. The petitioner then listed a number of position titles with brief job descriptions. The petitioner also

provided IRS W-2 Forms, Wage and Tax Statements issued to four employees in the year 1998. The director concluded that the petitioner had not established that the beneficiary would be performing the duties of a manager as defined by regulation. The director concluded, instead, that due to the lack of information regarding the petitioner's employees it appeared the beneficiary would be performing the day-to-day work of the petitioner. The AAO affirmed the director's decision on appeal stating, "without a sufficiently detailed description of the positions and job duties of subordinate staff, the Service cannot determine whether the beneficiary's proposed employment is in a qualifying executive or managerial capacity." The AAO also noted inconsistencies in the record regarding the petitioner's purported employees.

On motion, counsel for the petitioner asserts that the petitioner has repeatedly addressed the issue regarding its employees and has submitted sufficient evidence of its employees. Counsel also asserts that the Service failed to take into consideration the reasonable needs of the petitioner in light of its overall purpose and stage of development. Counsel further asserts that the description of the beneficiary's duties demonstrate that the beneficiary is to be working primarily as a manager of an essential function, and that the essential function is operated by a number of employees as determined by the reasonable needs of the petitioner.

Counsel's assertions are not persuasive. Contrary to counsel and the petitioner's assertions, the record does not contain independent documentary evidence that it employs independent contractors. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The record does not contain evidence of the duties performed by the four intermittent workers who were issued IRS Form W-2s by the petitioner. The record contains no independent evidence that these four individuals were performing work at the time the petition was filed in April of 1998. The petitioner's description of the beneficiary's duties, contrary to counsel's assertion, is indicative of an individual performing production-oriented duties for the petitioner. The beneficiary apparently will spend 45 percent of his time trying to find an investor in Taiwan and trying to sell the petitioner's services and strategy in Taiwan. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The remaining portion of the description of the beneficiary's duties broadly paraphrases section 101(a)(44)(B)(ii) of the Act without conveying an understanding of exactly what the beneficiary will do on a day-to-day basis.

Counsel's attempt on motion to transform the beneficiary's proposed duties into the management of an essential function is not persuasive. Again, contrary to counsel's assertion, the record does not contain a comprehensive description of an essential function that the beneficiary will manage. The Service cannot deduce, from either the description of the beneficiary's duties or the nature of the petitioner's business, what essential function the beneficiary will purportedly supervise. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 BIA 1980). Therefore, the lack of supporting evidence fails to demonstrate that the beneficiary will perform managerial or executive duties.

Counsel claims that the petitioner's business is seasonal and that, in light of the nature of the petitioner's business its reasonable needs require independent contractors. Counsel and the petitioner did not explain why real estate market research is seasonal. It is certainly unclear from the record what the beneficiary will be doing when the petitioner is not operating at full capacity.

Moreover, if staffing levels of the petitioner are considered, the Service must also consider the reasonable needs of the petitioner.

In this case, the petitioner has provided little evidence regarding the day-to-day duties of any of its employees. The petitioner has not provided consistent evidence regarding the number of its staff. The petitioner has not provided any documentary evidence that it employs independent contractors. The petitioner has not provided an organizational chart that bears any relation to the hierarchical structure of the petitioner at the time the petition was filed. It is not possible to determine from the lack of information on these issues that the reasonable needs of the petitioner could plausibly be met by the services of the staff on hand without the beneficiary contributing to the performance of a majority of the operational tasks of the company. Further, the number of employees or lack of employees serves only as one factor in evaluating the claimed managerial or executive capacity of the beneficiary. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity. As discussed above, the petitioner has not established this essential element of eligibility.

The second issue to be examined in this proceeding is whether the beneficiary has established its ability to pay the proffered wage of \$40,000 per year.

On motion, counsel asserts that the Service did not consider the financial support of the petitioner's foreign parent company when determining that the petitioner had not established its ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2) requires that the prospective United States employer have the ability to pay the proffered wage. The regulation does not countenance the

inclusion of separate entities pledging their support to the petitioning entity. The Service declines to speculate that the petitioner's claimed parent company will support the petitioning entity in its efforts to pay the beneficiary the proffered wage. Moreover, the regulations require that the petitioner must be a viable company with sufficient documented income to support the beneficiary's proffered wage. As noted by both the director and the AAO, the petitioner has not provided evidence of this ability either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The third issue to be examined in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's overseas employer and whether the AAO may consider this question without violating due process.

The AAO, like the Board of Immigration Appeals, is without authority to apply the doctrine of due process so as to preclude a component part of the Service from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. See *Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). In this case, the record clearly reflects the petitioner's lack of qualifying relationship with the beneficiary's overseas employer. The petitioner has not complied with the essential requirements to establish eligibility for this visa classification including establishing a qualifying relationship. The AAO notified the petitioner of the qualifying relationship deficiency in the dismissal. If the petitioner had a response to its lack of qualifying relationship, the petitioner could have submitted such a response in this motion. The petitioner chose not to address the issue. The AAO again determines that the petitioner has not established this essential element of eligibility and that, for this additional reason, the petition cannot be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, § 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.